

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Kyle Clayton Ray,

Petitioner

V.

Howell, et al.,

Respondents

Case No.: 2:19-cv-00700-JAD-CWH

Order Dismissing Second and Successive Petition

ECF Nos. 1, 2

Petitioner Kyle Clayton Ray brings this pro se 28 U.S.C. § 2254 petition for a writ of habeas corpus to challenge his 1999 state-court conviction for murder with the use of a deadly weapon.¹ Because he paid the filing fee, I deny his application to proceed in forma pauperis as moot. And having reviewed his petition, I now dismiss it as second and successive.

Analysis

Under 28 U.S.C. § 2244(3)(A), “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Because the dismissal of a petition with prejudice as untimely or because of procedural default counts as a disposition on the merits, such a dismissal renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244 and triggers the obligation to obtain an order from the Ninth Circuit Court of Appeals authorizing the new action before it can be filed.²

¹ ECF No. 1-1.

² *McNabb v. Yates*, 576 F.3d 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005).

1 Petitioner indicates on the face of his petition that he seeks to challenge his 1999 Nevada
2 state judgment of conviction in case no. 8659.³ This court takes judicial notice of its docket and
3 takes note that this petitioner previously filed case no. 3:01-cv-00680-DWH-VPC, in which he
4 challenged the same state judgment of conviction. In April 2004, this court denied that earlier
5 petition on its merits and entered judgment.⁴ Ray filed a notice of appeal, and the Ninth Circuit
6 Court of Appeals affirmed the denial of the petition in July 2006.⁵

7 This petition, therefore, is a second or successive habeas corpus petition,⁶ and petitioner
8 was required to obtain authorization from the Ninth Circuit Court of Appeals before filing it.⁷
9 Petitioner has not indicated that he has received such authorization from the court of appeals, so I
10 dismiss this action with prejudice. And because reasonable jurists would not find this conclusion
11 to be debatable or wrong, I do not issue a certificate of appealability.

12 Conclusion

13 IT IS THEREFORE ORDERED that the application to proceed in forma pauperis and
14 motion for appointment of counsel (**ECF Nos. 1, 2**) are **DENIED** as moot.

15 IT IS FURTHER ORDERED that **this action is DISMISSED with prejudice.**

16 IT IS FURTHER ORDERED that **a certificate of appealability is DENIED.**

17 IT IS FURTHER ORDERED that the Clerk of Court is directed to **DETACH** and **FILE**
18 the petition (ECF No. 1-1); **ADD** Aaron D. Ford, Nevada Attorney General, as counsel for
19 respondents; electronically **SERVE** the petition and a copy of this order on respondents. No
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21 ³ ECF No. 1-1, p. 2.

22 ⁴ Case No. 3:01-cv-00680-DWH-VPC, ECF Nos. 29, 30.

23 ⁵ *Id.* at ECF Nos. 31, 46, 47.

⁶ *Henderson*, 396 F.3d at 1053.

⁷ 28 U.S.C. § 2244(b)(3).

1 response by respondents is necessary; **ENTER JUDGMENT** accordingly; and **CLOSE THIS**
2 **CASE.**

3 Dated: June 4, 2019

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6 U.S. District Judge Jennifer A. Dorsey
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